FOR ARGUMENT

No. 78-1821

In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, PETITIONER

v.

SYLVIA L. MENDENHALL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. Amicus American Civil Liberties Union (ACLU) contends (Br. 8-10) that a "seizure" within the meaning of the Fourth Amendment automatically occurs whenever a police officer begins to question an individual whom he suspects of criminal activity, unless the officer tells the individual that he is free to ignore the questions.[1] In support of this argument, the ACLU observes (Br. 10) that it is fair to resolve any ambiguity in favor of finding a seizure because the officer has it in his power to dispel the ambiguity of the situation by informing the individual of his or her right to leave or to

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[1]Respondent suggests (Br. 39 n.19) that the very conduct involved here of asking to see a driver's license and airline ticket was held to constitute a seizure in *United States* v. *Vasquez-Santiago*, 602 F. 2d 1069 (2d Cir. 1979). This contention is erroneous. The court there did not discuss whether a seizure had occurred.

decline cooperation with the inquiry. Apart from the fact that the individual is equally able to clarify any ambiguity by inquiring about his freedom to leave, the ACLU position is not supported by any prior decision of this Court.[2] Indeed, the position it urges is in substance the same as the contention rejected in *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973), that the validity of a consent to search should be conditioned upon an explanation of the right to withhold consent.

Moreover, there is no sound reason in Fourth Amendment policy for creating a presumption that encounters between law enforcement officers and individuals whose behavior they find suspicious constitute a seizure. It may be that some citizens cooperate with brief questioning by police because they feel obliged to defer to authority. This cooperation assists law enforcement officers in the performance of their duties, and the Fourth Amendment does not require that officers discourage such cooperation. As the Court said in *Terry* v. *Ohio*, 392 U.S. 1 (1968), a seizure occurs "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." 392 U.S. at 19 n.16.

The ACLU also contends (Br. 10) that the circumstances here demonstrate that respondent felt compelled to answer the agents' questions because otherwise she would not have acted so contrary to her self-interest. This inference is not a proper one; it amounts to a suggestion that any consent or confession

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[2]In *Sibron* v. *New York*, 392 U.S. 40 (1968), for instance, the Court deemed it an open question whether the initial encounter between Sibron and the officer constituted a seizure of Sibron's person, although the officer had given no warning such as the ACLU suggests would be a necessary predicate to a finding that an encounter was not a Fourth Amendment seizure.

by an individual that eventually turns out not to be advantageous to him should be deemed to be the product of coercion. The ACLU also notes (Br. 9-12) that individuals may feel compulsion because of subtle nuances of tone and gesture that are difficult for courts to weigh, and that here the subjective intent of the agents to stop her if she attempted to leave must have been communicated to respondent by such gestures. We agree that in some cases individuals may react to subtleties in tone and gesture that are difficult to articulate, just as experienced agents may suspect individuals of criminal activity based on subtle behavior that is difficult to articulate, and we do not suggest that an individual must point to "significant menacing conduct" in order to support a contention that the objective circumstances were such that he reasonably believed that he was not free to leave. We do contend that in the absence of any evidence that an individual should have felt compelled to answer an officer's questions, a seizure should not be held to have occurred. This is a question of fact for the trial court, and nothing in the record of this case indicates that respondent felt or should have felt compelled, by subtle behavior or otherwise, to answer the agents' questions.[3]

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[3]The question whether an ambiguous encounter should be held to constitute a seizure may depend in part on whether the circumstances are viewed from the perspective of a law-abiding citizen who has been approached with an inquiry by the police or from the perspective of one engaged upon a course of criminal conduct and fearing detection. The approach of the ACLU stresses the likely reaction of the latter type of individual (see Br. 10-11). In our view, however, the matter should be examined through the eyes of one who has committed no crime and has nothing to hide from the officers who approach him. While wrongdoers as well as law-abiding citizens are entitled to the protection of the Fourth Amendment, the primary focus is properly on whether a challenged police action

2. We have consistently contended that whether a police officer may stop (*i.e.*, temporarily "seize") an individual for questioning always depends upon the totality of the circumstances. The officer must have reasonable suspicion that an individual is engaged in criminal activity before he is entitled to make a stop. In making this determination, however, an officer is entitled to rely on his experience, which may enable him to ascribe suspicious significance to behavior that might appear wholly innocent to an untrained observer. See *Brown* v. *Texas*, No. 77-6673 (June 25, 1979), slip op. 4 n.2; *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 885 (1975). We contend that an officer is similarly entitled to rely on the collective experience of his colleagues. In the context of DEA airport surveillance, an informal compilation of collective expertise, known as a "drug courier profile," is used by agents as an aid in detecting couriers. But this case is not about the abstract validity of such profiles. We contend simply that a court, in assessing whether facts relied upon by an agent are sufficient to support an investigative stop, should not ignore the fact that certain characteristics of an individual that are observed by the agent, which may be innocent on their face, coincide with characteristics that have been determined by DEA agents to be common among drug couriers.

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unreasonably invades individual privacy by search or seizure. Stops based upon reasonable suspicion do not require probable cause; by hypothesis, therefore, a majority of those persons who are "seized" in such cases will have committed no crime. It is accordingly appropriate, in determining whether a given encounter constitutes a Fourth Amendment "seizure," to ask whether the law-abiding citizen so approached would reasonably conclude that he had been deprived of his freedom of movement, rather than to focus upon how one with a guilty conscience would view the same encounter.

Thus the ACLU (Br. 6) completely misunderstands our position in describing it to be that the reasonable suspicion standard is met "whenever an individual exhibits one or more of the characteristics of [the] 'drug courier profile.' " Observation by an agent of certain characteristics and behavior of an individual may in some cases constitute reasonable suspicion whether coincidence with the drug courier profile exists or not; by the same token, reasonable suspicion may not exist in some cases even if a factor of the drug courier profile is observed. The inquiry still must be whether the totality of the circumstances warrants a reasonable suspicion of criminal activity. Thus respondent's (Br. 41-47) and the ACLU's (Br. 20-26, 41-50) contentions that the drug courier profile itself does not constitute reasonable suspicion do not squarely address the issue presented in this case.

The ACLU does contend (Br. 45-49) that the profile is entitled to no weight because its application is subject to the discretion of an agent who may apply it in a discriminatory manner. This contention is without merit. With the profile, as with any other evidence indicating criminal activity, the police officer must make a determination whether he has a reasonable suspicion of criminal activity that would justify a stop.[4] This determination is judicially reviewable. The only discrimination sought to be made in making investigative

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[4]This degree of suspicion occasioning an encounter with an airline passenger arises only infrequently. Respondent's suggestion (Br. 7) that one or more passengers on each arriving flight are stopped and questioned is completely without foundation. Similarly, the ACLU's reference (Br. 4 n.1) to South African police practices involving mass stops is grossly inapposite to the DEA airport program, in which only a tiny fraction of all passengers are stopped—and only when the particular individual has aroused an agent's suspicion.

stops pursuant to the DEA airport surveillance program is between individuals reasonably suspected of criminal activity and individuals who are not—the discrimination that is required by the Fourth Amendment.

In this case, the record reflects reasonable grounds for suspecting respondent of engaging in criminal activity. The agents had observed her deplane last and scan the entire terminal as if looking for someone. She appeared unusually nervous. They knew that she was arriving from Los Angeles, a major source city for narcotics. She appeared to have no luggage, a characteristic that the agents had found common among drug couriers. In addition, the record shows that the agents observed respondent changing her flight plans to a different airline while keeping the same destination.[5] We submit that these facts gave the agents sufficient grounds for suspicion to justify the minimal intrusion, which we have argued did not amount to a seizure at all, of asking respondent if she would show the agents her driver's license and airline ticket.[6]

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[5]Respondent belatedly asserts (Br. 32-33) that the Official Airline Guide indicates that the agents must have been mistaken in their observation that respondent was ticketed through to Pittsburgh on American Airlines. But even if American Airlines had no flight from Detroit to Pittsburgh, at this time it is impossible to tell whether respondent was originally ticketed to Pittsburgh on another airline or whether she was ticketed all along on Eastern Airlines. The record is clear, however, that the agents, the court and respondent's counsel (see A. 17, 34) all understood at the suppression hearing that respondent was attempting to change her flight at the Eastern counter, and the district court so found (Pet. App. 15a).

[6]Indeed, the district court found (Pet. App. 18a) that these facts, together with additional facts discovered prior to the search of respondent's person, gave the agents probable cause to arrest respondent.

The ACLU asserts (Br. 39) that respondent's behavior was more innocent than that "observed and found not to give rise to

3. Respondent contends (Br. 25-29) that the determination of when an arrest requiring probable cause occurs depends upon three factors, and that here those factors compel the conclusion that the detention of respondent in the DEA office required probable cause.[7] First, respondent asserts that an arrest occurs whenever a person's freedom of movement is restrained. Manifestly, this cannot be the test, because *Terry* makes clear that a seizure that does not require probable cause still involves a restraint on movement. See 392 U.S. at 16. In any case, respondent's movement was not restrained at all.[8]

Second, respondent suggests that the purpose of the detention determines whether probable cause is needed. The purpose of a detention, of course, is relevant in considering whether the scope of the intrusion is reasonable under the Fourth Amendment, but the purpose itself does not determine whether probable cause is necessary. In any event, the purpose of the detention here was entirely proper and consistent with its status as

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reasonable suspicion" in *Sibron* v. *New York*, *supra*, and *Terry* v. *Ohio*, *supra*. In fact, the Court held that the officer did have reasonable suspicion to make a stop in *Terry*. In *Sibron*, the Court found that the officer did not have cause to *search* the suspect, but it specified that the question of the validity of the stop upon less than probable cause for interrogation purposes was not presented. 392 U.S. at 60 n.20.

[7]This question arises, of course, only if the district court's finding (Pet. App. 16a) that respondent went to the office voluntarily is rejected. Respondent (Br. 21-23) points to nothing in the record that suggests that this finding is erroneous.

[8]Respondent's suggestion (Br. 19) that she was locked in the DEA office is completely without foundation. As with most offices, the DEA office was locked from the outside when the door was closed, but the door was not locked to somone inside the office who wished to leave.

a temporary seizure of a kind that does not require probable cause. Contrary to respondent's suggestion (Br. 27), the fact that the agents asked respondent for consent to search is consistent with the treatment of the encounter as a stop. If requesting consent to search converted an encounter into an arrest requiring probable cause, the concept of consent searches of suspects would be largely redundant. In situations where officers had probable cause, they could arrest a suspect and conduct a search incident to the arrest without consent; if they had no probable cause, the rule advanced by respondent would prohibit them from requesting consent because that would convert the detention into an arrest. Clearly, this Court has not sanctioned such a restriction on the ability of officers to seek consent to a search; to the contrary, the Court has specifically encouraged officers to seek consents to search when they lack probable cause. *Schneckloth* v. *Bustamonte*, *supra*, 412 U.S. at 227-228.[9]

Third, respondent argues that the length of a detention determines whether probable cause is necessary. As we have noted in our brief (Br. 60-61), the length of a detention is an important factor, and the six minute detention involved here is not so intrusive as to require probable cause. Respondent asserts (Br. 28) that the detention here was of indefinite duration because respondent would have been forced to wait until an attempt was made to get a search warrant if she refused consent. This assertion is incorrect. Nothing in the

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[9]Respondent erroneously asserts that *Sibron* v. *New York*, *supra*, establishes that looking for narcotics is an improper purpose for an investigative stop. *Sibron* holds that a search for narcotics requires probable cause, even though an investigative stop may properly rest on reasonable suspicion; here, there was no search except by consent.

record suggests that the agents intended to detain respondent for any significant length of time if she refused consent, and it is clear that no such intention was ever communicated to respondent. In sum, the scope of the detention in this case was reasonable under the circumstances and was not sufficiently intrusive to require probable cause.

4. Respondent (Br. 50-53) and the ACLU (Br. 52-58) contend that respondent's consent to search was not voluntary under *Schneckloth* v. *Bustamonte*, *supra*. However, the record clearly indicates that the consent was voluntary, and the district court specifically found that the consent was "freely and voluntarily given" (Pet. App. 16a). The court of appeals did not purport to disturb this finding of fact on appeal; it held that there was no "valid consent to search within the meaning of *United States* v. *McCaleb*, 552 F. 2d 717 (6th Cir. 1977)" (Pet. App. 2a). This statement can only mean that the court of appeals found that the consent was invalidated by what it held to be an illegal detention; there is no suggestion in its opinion that the district court's factual finding was clearly erroneous.

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

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